Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2007-000821-001 DT 04/18/2008

HON. MARGARET H. DOWNIE

CLERK OF THE COURT
D. Whitford
Deputy

STATE OF ARIZONA

v.

FRANCESCA A FONTANA (001)

MICHAEL NORVILLE

JEFFERY MEHRENS

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

Lower Court Case No. 13536193-01, 02, 03, 04

The Superior Court has jurisdiction over this appeal pursuant to Article VI, Section 16 of the Arizona Constitution and A.R.S. § 12-124(A). The court has considered the record of the proceedings below, as well as the parties' memoranda and the arguments of counsel.

On January 31, 2007, Appellee Francesca Fontana was charged with four offenses in the Phoenix Municipal Court: (1) DUI in violation of A.R.S. § 28-1381(A)(1); (2) BAC of .08 or more within two hours of driving in violation of A.R.S. § 28-1381(A)(2); (3) extreme DUI in violation of A.R.S. § 28-1382(A); and (4) failure to drive in one lane/unsafe lane change in violation of A.R.S. § 28-729(1). On the night of her arrest, Appellee submitted to breath testing on an Intoxilyzer 8000 device manufactured by CMI, Inc. CMI is an Owensboro, Kentucky corporation.

Prior to trial, Appellee attempted to telephonically interview Larry Holm – a Kentucky resident and employee of CMI. Holm, through counsel, declined to be interviewed. Appellee filed a motion to compel Holm's interview pursuant to Rule 15.1(g), Ariz.R.Crim.P., which states:

> **Disclosure by Order of the Court.** Upon motion of the defendant showing that the defendant has substantial need in the preparation of the defendant's case for material or information not otherwise covered by Rule 15.1, and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, the court in its discretion may order any person to make it available to the defendant. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

The trial court heard oral argument on Appellee's motion to compel on May 24, 2007. The trial judge granted Appellee's motion and set a further hearing for July 11, 2007 to determine whether Holm's position regarding an interview had changed. On July 11, the State confirmed that Holm would not submit to an interview, despite its requests that he do so. The prosecutor repeatedly requested an evidentiary hearing if the trial court was considering imposing sanctions against the State. He argued that such a hearing was necessary for the defense to establish "substantial need" and why it could not "obtain the substantial equivalent by other means,"[1] as required by Rule 15.1(g). The State also argued that, before a sanction of suppression or dismissal was imposed, it was entitled to present evidence on these topics, as well as regarding its role (if any) in Holm's unavailability. The trial court did not set an evidentiary hearing. It instead took the matter under advisement and subsequently issued a written ruling dated August 14, 2007. The court ordered the suppression of Appellee's breath test results, stating, *inter alia*:

> On these specific facts and in this particular case, the State did exert control and access over CMI by having Mr. Holm to work on the Intoxilyzers while here at the State's request and expense. The State having invited Mr. Holm into this investigation thus turned him into a material fact witness that Defendant has a substantial need to interview in order to defend against the charges. Defendant is unable to obtain Mr. Holm's interview and the State has failed to make him accessible.

Thereafter, the State dismissed the charges without prejudice and filed the instant appeal. The State challenges the trial court's suppression order.

A trial court's suppression ruling will not be reversed on appeal absent clear and manifest error. *State v. Gulbrandson,* 184 Ariz. 46, 906 P.2d 579 (1995). Typically, an appellate court views the facts in the light most favorable to sustaining the trial court's ruling. *State v. Stanley,* 167 Ariz. 519, 809 P.2d 944 (1991); *State v. Swanson,* 172 Ariz. 579, 838 P.2d 1340 (App. 1992). Questions of law are reviewed *de novo. State v. Valenzuela,* 182 Ariz. 632, 898 P.2d

[1] The State argued that nothing in the record established that defense experts could not opine about the validity of Appellee's breath test results without information from Holm.

1010 (App. 1995). In the case at bar, the usual deference to the trial court's factual findings is inappropriate, as those findings were not the result of either stipulated facts or evidence presented by the parties.

The record reflects that Larry Holm was in Phoenix from November 13, 2006 until November 17, 2006 to conduct training on the operation and maintenance of the Intoxilyzer 8000 for the City of Phoenix and the Arizona Department of Public Safety. On November 15, Holm examined several Intoxilyzer 8000s owned by the City – including the one at issue in these proceedings. He signed a Phoenix Police Department "Intoxilyzer Maintenance Record" for that instrument which states, in pertinent part:

Describe the issues (if any) which warrant attention:

RFI[2] SETTINGS

Action Taken:

• Chopper Motor	• Lenses/Gaskets	• Power Supply
• Source	• Printer	• Changed Location
• Calibration	• Breathtube	
• Optimized DVM	• Cleared 3way Valve	

Resolution

FACTORY VERIFICATION OF RFI SETTINGS BY LARRY HOLM, CMI ELECTRONICS TECHNICIAN.

/s/ Lawrence J. Holm

QAS Performing Work: *Mike Campbell A4334*
Date Work Completed: *11/15/2006*
Final Location: *Lab*

I hereby certify that the above and foregoing is a true and correct copy of the record of periodic maintenance for the Intoxilyzer referenced therein maintained by the Phoenix Crime Lab pursuant to the requirements of the Department of Health Services.
Dated this Thursday, November 16, 2006.

Signature: */s/ Michael R. Campbell A4334*
Quality Assurance Specialist or Criminalist

[2] "RFI" is an acronym for "radio frequency interference."

The State is entitled to due process before it is sanctioned in the form of a suppression order. A party is generally required to present evidence, not merely argument or legal theory, to obtain the suppression of evidence. *See State v. Fimbres*, 152 Ariz. 440, 733 P.2d 637 (App. 1986). This is especially true in a case like this, where the State repeatedly requested an evidentiary hearing, where it articulated specific topics that required evaluation through testimony or documentary evidence, and where the State made at least a colorable claim that work performed by Holm was irrelevant to Appellee's breath testing occurring some eleven weeks later. Evidence that *is* in the record supports the following argument by the State:

> Starting on November 15, 2006 (after Holm confirmed the RFI settings were at factory settings) through January 16, 2007, Quality Assurance Specialists from the Phoenix Crime Law performed 5 Standard Calibration Check procedures and 5 Standard Quality Assurance Procedures on Appellee's breath testing instrument. The instrument was checked again approximately 8 hours after the Appellee's test on January 31, 2007. All of these procedures confirmed the instrument in question was operating proper [sic] and accurately and was capable of detecting RFI and aborting a test sequence if RFI was present. The Quality Assurance Specialists who performed these checks are still with the Crime Lab. Finally, there is no evidence that there were any RFI issues on the test record at the time of the tests. [footnotes omitted]

Appellant's Memorandum, p. 3.

Unlike another case with the same counsel that this court recently decided,[3] nothing in this record reflects a basis for believing that RFI was a factor with Appellee's test. There were no RFI-related failures. As noted above, quality assurance documents reflect that the device was functioning properly and accurately and was capable of detecting RFI and aborting a test sequence if RFI were present. The record is not developed as to why the defense could not

[3] *See State v. Vigenser*, LC2007-000733. In *Vigenser*, the trial judge and this court both noted the "compelling facts" that established the materiality of an interview with Holm, including:

- A few months before Mr. Vigenser was tested, there were reports of problems with the RFI settings on the Intoxilyzer 8000 used for his testing.
- In the months preceding Vigenser's tests, the RFI sensitivity level was adjusted on this instrument.
- The device used to test Vigenser failed eight times in a 24-minute period before producing BAC readings; four failures were RFI-related.
- Holm's analysis of this Intoxilyzer occurred only 13 days after Vigenser was tested on it.

"obtain the substantial equivalent by other means."[4] There is no evidence that information about Holm's November 2006 work is necessary for defense experts to render an opinion about the validity of Appellee's test results.

Although the criminal discovery rules are subject to broad interpretation, mere fishing expeditions will not be countenanced. *State v. Kevil*, 111 Ariz. 240, 527 P.2d 285 (1974). Appellee may well be able to present evidence supporting her claims of materiality, substantial need, and an inability to obtain the substantial equivalent through alternative means. But she needs to do so in the form of an evidentiary hearing before the State is sanctioned in a manner that effectively guts its case as to at least two of the three DUI charges. Based on the record before it, this court rejects the notion that CMI is so intertwined with the State that is functions as its agent, that due process *always* entitles DUI suspects to interview CMI employees, or that work by a CMI employee on a City-owned Intoxilyzer always brings that employee within the purview of Rule 15.1(f), Ariz.R.Crim.P.[5]

Conclusion

IT IS ORDERED reversing the trial court's suppression order

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for further appropriate proceedings consistent with this opinion.

[4] While the court agrees in theory that the defense is not required to simply accept the State's version of events, Rule 15.1(g) does require defendants to explore other potentially-available sources of information in order to demonstrate that no substantial equivalent for the requested information exists.

[5] *See State v. Armstrong*, 208 Ariz. 345, 93 P.3d 1061 (2004).